No. 83-222

In the Supreme Court of the United States

OCTOBER TERM, 1983

BORMAN'S INC.,
Petitioner,

vs.

ALLIED SUPERMARKETS, INC.
Respondent.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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1. This Case Involves Important Questions Regarding The Relationship Between Bankruptcy Law And Labor Law

This case involves important questions concerning labor and bankruptcy law and the interrelationship between the two. These questions take on added significance when considered against the background of the extra-judicial aid given by the bankruptcy judge to Allied Supermarkets, Inc. In its brief, Allied completely ignored the interplay of the two Acts and treated the substantive legal issues as secondary, while devoting much effort to an attack on the motives of Borman's in pursuing this litigation and to matters wholly outside the record.[1]

In essence, Allied suggests that simply because Borman's is a competitor of Allied, it should not be heard to complain about the incorrect decisions below and the improper procedures in which the bankruptcy judge engaged. But, it is that very competitive factor which gave rise to the multi-employer contracts relied upon for years by Allied, Borman's and Chatham. Indeed, multi-employer contracts by definition, involve competitors. And, although Allied failed to address the question, it cannot be denied that preservation of multi-employer bargaining is crucial to the national labor policy.

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[1] Allied's brief devotes considerable attention to an analysis of Borman's annual reports for the years 1976-1983 and additional store openings during this period. *See*, Allied brief, p. 4, n.2. Suffice it to say that Allied's selective references to Borman's annual report — which is not part of the record here — is neither fair nor accurate. For example, Allied notes that Borman's opened five supermarkets since 1979, without explaining that contracts to construct and occupy these markets were signed years ago, long before Borman's began to feel the financial impact of competing against a major chain which enjoyed significantly lower wage rates.

In any event, Allied's purported reason for engaging in this discussion of non-record material — that Borman's offered no evidence indicating that it would suffer from the rejection — is belied by the record itself. The district court specifically found "that there is *ample evidence* in the record supporting appellants' view that Allied's rejection of its collective could have a detrimental effect on Borman's and Chatham's business prospects . . ." (25a-26a; emphasis added).

The record is clear that for over twenty years Allied, Borman's and Chatham bargained with the Retail Clerks and Meat Cutters Unions as part of a multi-employer bargaining unit known as the United Supermarket Association ("USA"). The record is also clear that this bargaining produced multi-employer labor contracts between USA and the unions and both the unions and Allied recognized they were parties to multi-employer labor contracts. These contracts created not only rights and obligations between the employer members of USA and the unions, but also obligations between the employer members themselves.

Allied's brief completely fails to address the purpose of multi-employer bargaining — to give employers (who are competitors) and employees peace of mind by establishing uniform benefits and obligations. By entering into such contracts, the employers promise to perform the contract obligations not only to the union and its members, but also to each other. If, as now suggested by Allied, an employer were permitted to renegotiate a separate and different contract while *operating* under the multi-employer contract, then the bargained-for peace of mind would be eliminated because the uniform conditions would be destroyed. Employers would thus have no reason to enter into such contracts and the national labor policy favoring multi-employer bargaining would be undermined.

Moreover, the position urged by Allied is contrary to and is actually a wholesale rewriting of the district court's opinion. The district court found that Allied, Borman's and Chatham were "parties to the collective bargaining agreement which was rejected," and as parties had created a legal commitment to each other (25a). The Court declared:

> "That conclusion [the existence of a multi-employer unit], of course, compels the further conclusion *that Borman's, Chatham and Allied have mutual rights and obligations*" (17a; emphasis added).

Allied did not appeal that portion of the district court's decision, and is thus precluded from now urging that there is no "mutual" relationship between Allied and Borman's.

The fact that this case is not identical to *NLRB* v. *Bildisco and Bildisco*, 682 F.2d 72 (3rd Cir. 1982), *cert. granted*, ____U.S.____, 103 S. Ct. 784, 74 L.Ed.2d 992 (1983) highlights the need for this Court to consider the issues involved here. Consideration of this case will help insure that the Court's decision will be more complete and more likely to resolve potential conflicts between the two Acts.

2. This Appeal Is Not Moot

Allied's assertion that this appeal is moot is incorrect. A case is moot when the "parties lack a legally cognizable interest in the outcome." *Powell* v. *McCormack*, 395 U.S. 486, 89 S.Ct. 1944, 23 L.Ed. 2d 491 (1969). The parties in this case have a very real interest in its outcome. If the bankruptcy court's order is invalid, Allied may be deemed to still be a member of USA. *See, Authorized Air Conditioning Co., Inc.* v. *NLRB*, 606 F.2d 899 (9th Cir. 1979) *cert. denied*, 445 U.S. 950, 100 S.Ct. 1598, 63 L.Ed. 2d 785 (1980); *NLRB* v. *Central Plumbing Co.*, 492 F.2d 1252 (6th Cir. 1974); *Universal Insulation Corp.* v. *NLRB*, 361 F.2d 406 (6th Cir. 1966); *NLRB* v. *Jeffries Banknote Co.*, 281 F.2d 893 (9th Cir. 1960).

It is fundamental that "[a]n issue is not deemed moot if it is 'capable of repetition, yet evading review.'" Tribe, *American Constitutional Law* (1978), §3-14, p. 64, quoting *Southern Pacific Terminal Co.* v. *Interstate Commerce Comm'n.*, 219 U.S. 498, 515, 31 S.Ct. 279, 55 L.Ed 310 (1911). In determining whether a particular case satisfies the *Southern Pacific Terminal* doctrine, the court should consider the time typically involved in obtaining complete judicial review. *See, First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 774-775, 98 S.Ct. 1407, 55 L.Ed. 2d 707, *reh. denied*, 438 U.S. 907, 98 S.Ct. 3126, 57 L.Ed. 2d 1150 (1978); *Roe* v. *Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed. 2d 147, *reh. denied*, 410 U.S. 959, 93 S.Ct. 1409, 35 L.Ed. 2d 684 (1973); *Southern Pacific Terminal Co.* v. *Interstate Commerce Comm'n.*, *supra*.

In *First National Bank*, the Court held that 18 months was too short a time period to obtain the requisite review and in *Southern Pacific*, two years was deemed to be insufficient. Borman's has proceeded with dispatch to perfect and pursue its appeal rights in the district court and the court of appeals.

It is quite possible that the issue presented here may arise again. Indeed, the very harm which Borman's warned about in the bankruptcy court came to pass, with Chatham filing under Chapter 11 and seeking to have Local 876 forego pay raises provided for in the USA contract. Faced with a major competitor who enjoys preferential wage rates, Borman's is vitally interested in, and entitled to an opinion concerning, the validity of Allied's contract rejection.

Because of the "contract bar rule," which in most instances prohibits filing of an union election petition during the first three years of a collective bargaining agreement, labor agreements are virtually never more than three years and many are less. *See*, Gorman, *Basic Text on Labor Law* (1976), §9. It is thus unlikely that this issue would ever be resolved before expiration of a collective bargaining agreement.

In a display of particular brazenness, Allied argues that, since Borman's did not seek a stay of proceedings, it has waived its right to a review of the bankruptcy court order. When considering this position, it must be remembered that Allied made repeated assurances that rejection of the labor contracts was only the first step down a long road toward implementation of the business plan and that plan was but the first step toward the ultimate goal of formulating a plan of arrangement. In closing argument in the bankruptcy court, Allied's lawyer said:

> "As the Court is well aware, there is a vast difference between formulating a business plan which will allow the Debtor to operate profitably and formulating a plan of arrangement to settle the obligations a Debtor has to its creditors.
>
> * * *

Obviously, the *first thing* that must be done is to formulate some plan, some business plan which will make a plan of arrangement feasible" (emphasis added).

Moreover, Borman's justifiably relied on the testimony of Allied's chairman and the representations of its counsel that no part of the business plan would be implemented unless and until all of its component parts fell into place. That included obtaining wage concessions from the Teamsters Union. Allied's chairman testified as follows:

"Q. (By Mr. August [Allied's lawyer]) Now, did you make any commitments to the union leadership who was present at that meeting and whose contract we seek to terminate today?

What would happen in the event you could not get all employees to agree to the proposal?

A. Yes.

Q. What is the commitment you made?

A. The commitment is that the plan is made up of varying components *and all components must fall in place*. There can be no back out or fallback position" (emphasis added).

Both Allied's chairman and counsel were quick to point out to the bankruptcy court and the intervenors that there was no need to then worry about new contracts being negotiated with the Retail Clerks and Meat Cutters because nothing would happen until everyone, including the Teamsters, agreed to wage concessions.

"Q. (By Mr. August [Allied's lawyer]) Mr. Smith, although we are only seeking the rejection of three contracts today, *is it your understanding that no implementation of concessions by any union will be put into full force and effect, even if the Court allows the rejection of these contracts unless you have the commitment of all employees of the company to participate in the concessions you have outlined*?

A. *That is correct.*

Q. In other words, it is an all or nothing?

A. It is all or nothing."

* * *

Q. (By Mr. Driker [Borman's lawyer]) Mr. Smith, as I understand your direct testimony, *it is your opinion as the chief executive officer of Allied and as the Court's designated agent for the Debtor in Possession that in order for the business plan of arrangement to be effectuated, there has to be a modification of all of the labor contracts to which Allied is a party.*

A. *That is correct.*

Q. And that includes not only the three labor contracts which are specifically the subject of this hearing today, but any other labor contracts as well?

A. That is correct.

Q. And that would include more specifically *contracts between Allied and Local 337 of the Teamsters.*

A. That and others.

Q. And others" (emphasis added).

In the face of these representations, Borman's was justified in its belief that implementation of the wage concessions was neither imminent nor likely, given the open-court statement of the Teamsters Union that it would not agree to *any concessions*. As stated by the Teamsters' representative at the commencement of the hearing:

"MR. COLEMAN: I am Jerome Coleman and we represent Teamsters Local 337, parties who have a contract with Allied Supermarkets.

For the Court's edification, your Honor, I have been asked by my client to notify the Court in respect to the application before the court to reject certain collective bargaining agreements, one of which is not the collective bargaining agreement or collective barganing agreements with Local 337.

On March 28, 1979, Local 337 which bargains for approximately 500 employees of Allied Supermarkets sent a letter to Earl W. Smith, Chairman of Allied Supermarkets, indicating that the collective bargaining agreements between Local 337 and Allied remained in full force and effect and without change and that the union also demanded an enforcement of those collective bargaining agreements in respect to all of their terms.

I merely wish to advise the Court that at least presently it is the position of Local 337 that all five of its collective bargaining agreements will remain in full force and effect without change.

The recent vote that the Court may have had notice of was advisory in nature only.

The executive board, which is the ruling body of the Local, has not met to approve or disapprove the vote of its counsel [sic].

THE COURT: Well, I don't want to interrupt you — I don't want to interrupt you, but is there an application before the Court to reject these?

MR. AUGUST: No, there is not.

THE COURT: Well, you see, just so that we don't get confused.

MR. AUGUST: We have no objection if counsel will complete his statement, your Honor.

THE COURT: Well, all right. I don't want to make anything tough for you.

All right. Go ahead.

MR. COLEMAN: I merely wish to indicate to the Court that if in fact as we know the law to be under the collective bargaining agreements between Local 337 or any other union, if in fact this Court should decide to reject those agreements, one of the options available to Local 337, and of course the other unions is to immediately demand negotiations with respect to those agreements and, if necessary, strike in support of those demands.

In that case, we are merely indicating to the Court that in the opinion of the union, at least that I represent, it would extremely unwise to do so at this time because this certainly would affect the rights of our members.

THE COURT: Well, sir, I don't go out and grab people and bring them in here to present matters to me.

They haven't brought a petition before me to reject your contract.

When they do, I will decide it.

And until they do, I am not even interested in it" (emphasis added).

Allied's representations that without the agreement of all of the unions, the wage concessions would not be implemented, together with the Teamsters open-court refusal to make any concessions, had the effect of a self-imposed stay by Allied. It was not until many months later, after the parties had filed their appeal briefs in the district court, that Borman's learned of the bankruptcy judge's extra-judicial efforts in convincing the Teamsters to make the wage concessions it had previously refused to make, so that the order the judge had entered could be implemented. It would be a perversion of justice to hold that Borman's right to a meaningful review has been lost because the bankruptcy judge, at Allied's behest, went outside the courtroom to aid its cause. Surely Borman's should not be penalized for Allied's wholly inappropriate conduct. And, the bankruptcy judge's improper actions should not escape review by this Court under the guise of a mootness claim.

Finally, Allied made these identical "mootness" arguments to the Sixth Circuit Court of Appeals. That court rejected the arguments and addressed substantive issues. For this reason alone, this Court should also address the issues. *See, Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 101 S. Ct. 2748, 69 L.Ed. 2d 616 (1981).

Respectfully submitted,

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